Dato' Jaffar bin Mohd Ali & Anor v Jasatera Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-890 OF 1999
GOPAL SRI RAM, NH CHAN AND AHMAD FAIRUZ JJCA
24 JANUARY 2000

Civil Procedure *— Injunction — Discretion to grant — Removal of directors, application to restrain — Judge directed his mind to circumstances existing at time of application — Whether court should have considered status quo at time of passing of resolutions to remove directors — Whether Court of Appeal should interfere with judge's exercise of discretion*

The parties were disputing over the alleged removal of certain directors of the first respondent company at the board meeting held on 31 December 1998. The appellants' application for injunctive relief was refused by the trial judge; hence this appeal. Counsel for the respondents argued that the learned judge had addressed his mind to relevant matters in the case and exercised his discretion correctly. Moreover, counsel reminded, this case concerns the judge's exercise of discretion and that it ought not to be interfered with.

Held, allowing the appeal:

The learned judge had asked himself the wrong question when he only directed his mind to the circumstances existing at the time of the application. He should have directed his mind to the status quo as at the time of the impugned meeting of 31 December 1998, ie as at the date of the passing of the impugned resolutions. Consequently, he should have concerned himself with the question whether the status quo prevailing immediately before the passing of the impugned resolutions should be maintained. Thus, the court, in exercising its powers under s 69(4) of the Courts of Judicature Act 1964 granted an injunction restraining the respondents from implementing the impugned resolutions passed on 31 December 1998 (see p 280C–D, H)

[Bahasa Malaysia summary

Pihak-pihak telah mempertikaikan tentang dakwaan pengalihan pengarah-pengarah tertentu syarikat responden pertama di dalam mesyuarat yang telah diadakan pada 31 Disember 1998. Permohonan perayu untuk mendapatkan relif injunksi telah ditolak oleh hakim perbicaraan; justeru itu, rayuan dibuat. Peguamcara bagi pihak responden-responden telah menghujahkan bahawa hakim yang arif telah mengarahkan fikiran beliau pada perkara-perkara yang relevan di dalam kes tersebut dan telah menggunakan budi bicara beliau dengan betul. Tambahan pula, peguamcara mengingatkan, kes ini adalah berhubung dengan penggunaan budi bicara hakim dan bahawa ia sepatutnya tidak dicampurtangani.

Diputuskan, membenarkan rayuan tersebut:

Hakim yang arif telah menanyakan diri sendiri persoalan yang salah apabila beliau hanya mengarahkan fikiran beliau kepada keadaan yang wujud pada masa permohonan tersebut. Beliau sepatutnya mengarahkan fikiran beliau kepada status quo pada masa mesyuarat yang dipersoalkan pada 31 Disember 1998, iaitu pada tarikh resolusi-resolusi yang dipersoalkan tersebut diluluskan. Selanjutnya, beliau sepatutnya mengambil berat tentang persoalan sama ada status quo yang wujud sejurus sebelum resolusi-resolusi yang dipersoalkan tersebut diluluskan sepatutnya dikekalkan. Justeru itu, mahkamah, di dalam menggunakan kuasanya di bawah s 69(4) Akta Mahkamah Kehakiman 1964 telah memberikan injunksi menyekat responden-responden daripada melaksanakan resolusi-resolusi yang dipersoalkan yang telah diluluskan pada 31 Disember 1998 (lihat ms 280C–D, H).]

Notes

For a case on discretion to grant injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1951.

Cases referred to

Garden Cottage Food Ltd v Milk Marketing Board [1984] AC 130 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(4)

S Kulasegaran (*Aneeta Kulasegaran* and *Visalrani* with him) (*Ranjit, Thomas & Kula*) for the appellants.

Ngeow Yin Ngee (*BK Seah* and *MC Loke* with him) (*Loke & Associates*) for the respondents.

Gopal Sri Ram JCA (delivering oral judgment of the court): This is an appeal against the decision of the learned judge of the High Court at Shah Alam refusing the injunctive relief sought by the appellants. The factual matrix against which this application was filed is sufficiently set out in the judgment of the learned judge and we do not propose to repeat it here. The substance of the dispute relates to the alleged removal of certain directors of the first respondent company at the board meeting held on 31 December 1998.

The respondents had argued in the court below — and these arguments were repeated before us — that there was no removal but a mere vacation of office in accordance with the articles of association. Mr Ngeow for the respondents has carefully taken us through the judgment of the learned judge in order to demonstrate two points.

First, that the two directors, Datuk Yeop Adlan bin Che Rose (the second appellant) and Mr Tan Seng Chai (not a party to the proceedings) were not removed. It was said that they had, by reason of their failure to

attend meetings, vacated their office according to art 91(g) of the articles of association. That article reads as follows:

> The office of director shall become vacant if the director:
>
> (g) is absent without the previous sanction of the board of directors for more than six (6) successive directors' meetings, and his alternate director (if any) shall not during such period have attended in his stead from meetings of the directors held during that period and the directors resolve that his office be vacated.

Secondly, Mr Ngeow sought to argue that the learned judge had addressed his mind to relevant matters in the case and exercised his discretion correctly. Counsel also reminded us that this case concerns the judge's exercise of discretion and that it ought not to be interfered with.

The principles upon which an appellate court may interfere with the exercise of discretion are set out in Lord Diplock's speech in *Garden Cottage Food Ltd v Milk Marketing Board* [1984] AC 130 where he said (at p 137):

> The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

For the appellants, Mr Kulasegaran has argued that the learned judge went wrong principally on the question of whether the status quo ought to be maintained. As to what is meant by the expression 'status quo', Lord Diplock said in *Garden Cottage* as follows (at p 140):

> The history of the trading relations between the company and MMB, as I have outlined them, make it difficult to identify what was the relevant status quo which it was said in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 it is a counsel of prudence to preserve when other factors are evenly balanced. The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query; existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period

immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo.

Since this is an appeal against an interlocutory order, any pronouncement we made may affect the mind of the trial judge. Hence the less we say of the merits of the case the better. It is therefore emphasised that nothing we say in this judgment is meant to be taken as a direction as to what findings are to be made after all the evidence has been taken. However, we are most concerned with the question whether the judge asked himself the right question when considering the issue of maintaining the status quo.

Having considered to Mr Kulasegaran's submissions, we agree with him that in the light of the factual matrix and historical background of the case, the learned judge did in fact ask himself the wrong question. Unfortunately, he only directed his mind to the circumstances existing at the time of the application. In our view, he should have directed his mind to the status quo as at the time of the impugned meeting of 31 December 1998, ie as at the date of the passing of the impugned resolutions. Consequently, he should have concerned himself with the question whether the status quo prevailing immediately before the passing of the impugned resolutions should be maintained. He did not do that. It is here that he fell into error.

The learned judge quite rightly held that there are serious questions to be tried. Having read the evidence on record referred to us during argument by both Mr Kulasegaran and Mr Ngeow, we are satisfied that a cloud exists over the question on whether there was a removal or vacation.

Having carefully considered this matter, we have come to the conclusion that the learned judge failed to address his mind correctly on the all-important question of status quo and we consider this is an appropriate case for appellate intervention. If the learned judge had addressed his mind to the circumstances in which the resolutions were passed, he would not have come to the conclusion he did.

We therefore allow the appeal and set aside the order of the judge. However, we agree with Mr Ngeow that it is not proper, in the circumstances of the present case, to grant an order in terms of the appellant's summons. Accordingly, we decline the relief sought in prayers 1, 2 and 3 of the appellant's summons. This is, however, an appropriate case for the exercise of the powers conferred upon us by s 69(4) of the Courts of Judicature Act 1964. We therefore act upon the prayer for further or other relief contained in the appellant's summons and grant injunction restraining the respondents from implementing the impugned resolutions passed on 31 December 1998.

The appellant will have the costs at all levels. The deposit paid into court shall be refunded to the appellant. We direct an early trial of the action. So that there will be no further delay, we also direct that the suit be fixed for mention tomorrow (26 January 2000) at 9am before the High

A Court at Shah Alam to enable counsel to appear before the learned judge to obtain directions as to the further conduct of the action.

Appeal allowed.

Reported by Loo Lai Mee

B

C

D

E

F

G

H

I